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ALEXANDER L. STEVAS,
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No. 83-1532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of CARL MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of ANN B. MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Guardians of DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER and FRANK MCFATHER, as next friends for DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER, FRANK MCFATHER, PENNY MCFATHER, JILL MCFATHER, JEFF MCFATHER, DANIEL MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

RESPONSE TO MOTION TO DISMISS APPEAL

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RESPONSE OF APPELLANTS TO APPELLEE'S MOTION TO DISMISS

In our response to the Appellee's arguments directed toward dismissal of the appeal, we will sometimes refer to Appellle as "Cotton States" and sometimes refer to Appellants as "the McFathers".

A great deal of Appellee's Motion to Dismiss comes close to being an argument on the merits (pp. 1-7). We respond to that portion of its motion only by pointing out that on p. 3 of its motion to dismiss, Appellee cites State Farm Fire & Casualty Co. v. Sweat, 547 F. Supp. 233 (N.D. Ga. 1982), but other decisions of judges of the Northern District of Georgia were to the contrary, namely:

Cotton States Mutual Insurance Co. v. J. O. Anderson, Jr., etal., (N.D. of Ga. 1983)

Taylor v. Hartford Cas. Ins. Co., 545 F. Supp. 282 (S.D. Ga., 1982)

State Farm Mutual v. Bates, 542 F. Supp. 807 (N.D., Ga., 1982).

I. (a) APPELLANTS HAVE CHALLENGED THE CONSTITUTIONAL VALIDITY OF THE STATUTE

Cotton States questions our constitutional attacks on several grounds: "The appellants do not draw into question the constitutional validity of the state statute itself..." (Motion, p. 8) These quoted words make up a statement which is not true. Appellants challenged the constitutional validity of O.C.G.A. 33-34-6, former Ga. Code Sec. 56-3406(b), as erroneously construed by the Georgia Supreme Court and erroneously applied by that Court to deprive the plaintiffs of their protected and vested rights in their judgment.
(Jurisdictional Statement of Appelllants, p. 3)

Cotton States, in spite of a great deal of bold language, cites only two cases in this section of its motion. Agins v. City of Tiburon, 447 U.S. 255, at pp. 259-260, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), is not in point. "The question in this case is whether a municipal zoning ordinance took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments." (pp. 257-258). In note 6, cited by Cotton States, the Court said only: "In this case, the State

Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review."

The other case cited by Cotton States in this section is Commercial Bank of Cincinnati v. Eunice Buckingham's Executors, 46 U.S. 317, 5 How. 317, 12 L.Ed. 169 (1847). This Court has distinguished that case more effectively than we could possibly do:

> "There (Commercial Bank, supra) both the prior and subsequent statutes were admitted to be valid under any construction of them. 'And therefore no construction placed by the state court on either of them could draw in question its validity, as being repugnant to the Constitution of the United States or any Act of Congress.'" Baltimore and Potomac R. Co. v. Hopkins, 130 U.S. 210, at p. 210, 32 L.Ed. 908, 9 S.Ct. 503 (1889).

The Supreme Court of the United States, in yet another case, has distinguished The Commercial Bank, supra, and also rejected Appellee's argument that "construction" of a statute can not raise a question of constitutional validity:

> "The case of The Com. Bank v. Buchingham's Executors, 5 How. 317, does not conflict with this view, because that was a case in which the prior and the subsequent statutes were both admitted to be valid under any construction of them, and therefore no construction placed by the state court on either of them could draw in question its validity, as being repugnant to the Constitution of the United States or any Act of Congress." Bridge Proprietors v. Hoboken L. and I. Co., 68 U.S. at p. 143, I Wall 116-155, 17 L.Ed. 571, at p. 576 (1864). (Emphasis added)

As pointed out in our jurisdictional statement (p. 10), the Georgia Supreme Court denied due process of law under the Fourteenth Amendment when it "construed" and "applied" the Georgia "no-fault" law 30/60 day penalty, attorneys' fees, punitive damages section to run or be triggered only from a time when the Georgia Supreme Court made the law clear, when the triggering event by statute really was the time when the McFathers filed reasonable proof of their claims with Cotton States.

In this connection, see:

In Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284 (1), 91 S.Ct. 1780 (1971), this Court said at page 289:

"[1] The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently

[403 US 18]

Claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal."

See also:

Missouri Ex Rel Missouri Ins. Co. v. Gehner, 281 U.S. 313, 74 L.Ed. 870 (2), at p. 876, 50 S.Ct. 326 (1930) (Construe)

Japan Line Ltd. v. County of Los Angeles, 414 U.S. 434 (4), 60 L.Ed.2d 336, at p. 343, 99 S.Ct. 1813 (1979) (Apply)

Cardindale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, at p. 400, 89 S.Ct. 1162 (1969) (Construe and apply)

Wilson v. Cook, 327 U.S. 474 (2), 90 L.Ed. 794, at p. 799, 66 S.Ct. 663 (1946)

Herndon v. Georgia, 295 U.S. 441, 79 L.Ed. 1530 (5), at p. 1533, 55 S.Ct. 794 (1935) ("Construed")

In a case cited by Appellee in its motion to dismiss (p. 16), this Court said:

"Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment [680] would be obvious. Ettor v. Tacoma, 228 U.S. 148, 57 L.Ed. 773, 33 Sup. Ct. Rep. 428. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First Nat. Bank v. Weld County, 264 U.S. 450 68 L.Ed. 784, 44 Sup. Ct. Rep. 385) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative,

executive or administrative, branch of government. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, at p. 1113, 50 S.Ct. 451 (1930)

I. (b) THE ACTIONS OF STATE COURTS IN THE CONSTRUCTION OF STATUTES ARE SUBJECT TO REVIEW BY THIS COURT.

Appellee euphemistically views the activity below as "the fact that the Georgia Supreme Court merely utilized the commonplace and unremarkable procedure of remanding a case to the trial court for resolution of a factual issue which cannot be resolved based on the record on appeal...." (Motion to dismiss, p. 11)

Appellee responds to our showing of a denial of due process by referring to the remand to the trial court "... where, presumably, due process will be afforded to pellants. ..." (Motion p. 11). If the trial court does not afford to the McFathers any more due process than the Georgia Supreme Court did, they will indeed be in bad shape.

Appellee's citations need to be examined more closely than Appellee's characterization of them.

Bethell v. Demaret, 77 U.S. 537, 10 Wall 537, 19 L.Ed. 1007 (1871), was simply a contest on a matter of fact. No constitution, statute or treaty was cited relating to validity of the contract. On page 1008, the Court said:

> "As no federal question appears in the record, the motion to dismiss must be granted."

Commercial Bank, supra, is cited again on page 12 of the motion. As we have showed above, that case is easily distinguished in Baltimore and Potomac R. Co., supra, and in Bridge Proprietors, supra.

In Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 33 S.Ct. 605, 57 L.E. 982 (1913), this Court pointed out that:

> "The claim...the court below denied to the plaintiffs in error due process of law under the 14th Amendment is neither real nor substantial, but so entirely without merit as to justify this court in refusing to take jurisdiction." (p. 984) (Emphasis added)

Appellee failed to demonstrate the significance of

Waters-Pierce Oil Co. v. Texas, 212 U.S. 112, 29 S.Ct. 227, 53 L.Ed. 431 (1909) (Motion, pp. 12-13). However, in the second line of their quotation, the distinguishing word does appear: "The practice of the state courts in acting upon matters within their jurisdiction..."(emphasis added) (Motion, p. 13).

Appellee, in a cavalier approach, refers (Motion, p. 14) to our contention that the Georgia Supreme Court "somehow" violated due process as "patently without merit" and also as "curious" because, they say, "the procedural tool of remand is widely used and accepted." They then suggest that "the very purpose" of this remand is to preserve "the due process rights of the parties to a full and fair hearing."

This is very elegant language indeed, but where is the law and where are the facts? The striking thing about Appellee's responses to the jurisdictional statement of Appellants is that Appellee manages to avoid facing any issue in the case. It's cross-appeal is no different.

Appellee misapplies Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), saying the Georgia Supreme Court "did not supply any new or unexpected basis" for our claim "of a denial of federal rights" (motion, p. 16). That is precisely what it did do. It turned around and changed the rule of O.C.G.A. 33-34-6 as contrued in Flewellen v. Atlanta Casualty Co., 250 Ga. 709, 300 S.E.2d 673 (1983)

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (5) (1930), (Appellee's motion, p. 16) actually supports Appellants' position, not Appellee's. It demonstrates clearly that a motion for rehearing is timely where the state court adopts a new construction of a statute:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief

> because of the newly found powers of the commission, the court transgressed the due [678] process clause of the 14th Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity....The petition was denied without opinion....We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law - using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The opinion of the Court in Waters-Pierce Oil Co. v. Texas 212 U.S. 112, 118, 29 S.Ct. 227, 53 L.Ed. 1107 (1930), is somewhat misleading. The quotation (Appellee's motion, p. 16) is correct, but the emphasis should not be on "without an opinion", but should rather be on "without an opinion passing on Federal questions." (Emphasis added)

II. (a) THE FEDERAL QUESTION WAS RAISED IN A MANNER TIMELY AND PROPER.

Appellee states (Motion, p. 14):

> "Appellants never once raised, prior to the Georgia Supreme Court decision in this case, the constitutional arguments they now seek to pursue."

It must be obvious to the reader of the papers in this case that only a clairvoyant could have done other wise. Our constitutional arguments were not "in this case" proir to the Georgia Supreme Court decision. In fact, our constitutional arguments are based on what the Georgia Supreme Court itself did to us. We pointed out in our jurisdictional statement (pp. 7-8) that the Georgia Supreme Court "without sustaining any challenged ruling of the trial court", nevertheless, turned the case around and sent it back to the trial court. Remand was a remedy Cotton States itself had not even requested.

This Court has held that "...the federal claim is timely if the ruling of the highest court could not have

been anticipated and a petition for rehearing presented the first opportunity for raising it."

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 77L.Ed. 360, 53 S.Ct. 145 (1932)

Brinkerhoff-Faris Trust & Sav. Co. Hill, 281 U.S. 673, 680,74 L.Ed. 1107, 113, 50 S.Ct. 451

Cardindale v. Louisiana, 394 U.S. 437, 22 L.Ed.(2) 398, 89 S.Ct. 1162

The motion for rehearing was Appellants' first opportunity.

Equally as unfair, impractical and contrary to law is the argument that our assertion of the federal question was not timely because it was not urged in our first motion for rehearing, but rather in our second motion for rehearing, that is our motion for reconsideration. Cotton States cites no authority to support that proposition. It is clear that the law is otherwise. Fleming v. Fleming, 68 L.Ed. 547, 264 U.S. 29, 44 S.Ct. 246 (1924). The rationale of the appellate rule (and it appears to be universal) requiring a point to be raised in the court below is to give the court below a fair chance to decide the question without being "sand bagged". This Court has held that the requirement is satisfied if the court below had an opportunity to consider the question. Cardindale, supra.

II. (b) THE GEORGIA SUPREME COURT COULD NOT FAIL TO CONSIDER THE QUESTION OF ITS OWN JURISDICTION AND THE WORD "DENIED" IS ENOUGH TO SHOW THAT IT DID.

In addition to the fact that the Georgia Supreme Court could not have "denied our motion for reconsideration (raising questions of its jurisdiction) without passing on the substantial federal questions raised itn that motion, the United States Supreme Court has held many times that, in showing that the state court had passed on a federal question, it is not necessary to show that the state court opinion even referred to the federal question:

"...it was held in this court that while the surpeme court of Illinois did not in its opinion expressly refer to the Federal constitutional rights asserted, the same was necessarily included in the judgement of the court and

therefore the case was reviewable here." Harding v. Illinois, 196 U.S. 78, 49 L.Ed. 394, at p. 397, 25 S.Ct. 176 (1904) (Emphasis added)

"We think notwithstanding the Dauphin County court, in its opinion, failed to discuss this matter, as the Supreme Court of Pennsylvania points out, the question was sharply presented to that court and decided by it, and [123] that the rights of the appellant were specifically preserved and pressed at every stage of the proceeding. We find, therefore that the question is here for decision." Schuylkill T. Co. v. Pennsylvania, 296 U.S. 113, 80 L.Ed. 91 (5), at p. 98, 56 S.Ct. 31 (Emphasis added)

It is enough to show that the federal claim was set up and that it was "denied", the very word used by the Supreme Court of Georgia.

> "It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law...
>
> "In such case if the court below denied the right claimed, it would be enough." Dewey v. Des Moines, 173 U.S. 193, 43 L.Ed. 665, at p. 667, 19 S.Ct. 379 (1899) (Emphasis added)
>
> "'The true and rational rule' this court said in Bridge Proprietors v. Hoboken Land & Improv. Co., 1 Wall. 143 [17:576], 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who bring the writ of error and that the right thus claimed by him was denied.' In Roby v. Colehour, 146, U.S. 159 [36:922], it was said that 'our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear form the record of the case, either that the right, of set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient. Powell v.

Brunswick County, 150 U.S. 440 [37:1137]; Sayward v. Denny, 158 U.S. 180 [39:941]; Chicago, Burlington & Q. R. R. Co. v. Chicago, 166 U.S. 226 [41:979]." Green Bay & M. Canal Co. v. Patten Paper Co., 172 U.S. 58, 43 L.Ed. 364, at pp. 368-369.

Courts can not waive jurisdiction, can not ignore it. It is the duty of every court, even on its own motion, to examine its jurisdiction. S. E. Underwriters Assn. v. Cravey, 216 Ga. 599, 600 (1961), 118 SE2d 471. Williams v. State, 217 Ga. 312, 122 SE2d 229.

III. THE CASE IS APPEALABLE UNDER COX BROADCASTING CORP. v. COHN.

In spite of the illegal action of the Georgia Supreme Court in attempting to remand this jury trial case to a judge for fact finding to validate the erroneous ruling of the Georgia Supreme Court ruling is appealable for review at this time. We submit that this Court has clearly established the rules in Cox Broadcasting Corp. v. Cohn, 43 L.Ed. 2d 328, 420 U.S. 469, 95 S.Ct. 1029 (1975): The old "face of the judgment" test no longer determines what is final. See Moore's Federal Practice, 2nd Ed., ¶508.01(10), pp. 8-34. In Cox, supra, this Court established four finality categories where:

1. The federal issue is conclusive or the outcome of any further proceeding in the state court is preordained.
2. The federal issue, as determined by the highest state court, will survive any possible outcome of future state court proceedings and require resolution by the Supreme Court.
3. The federal issue has been finally decided, but later review will be impossible regardless of the outcome of the subsequent state court proceedings.
4. Where the federal issue has been finally decided in the state court.

CERTIFICATE OF SERVICE

I certify that I am of Counsel for Ben McFather, et al., Appellants, and that I have served a copy of the within and foregoing Response to Motion to Dismiss Appeal by mailing a copy of the same, properly addressed, postage prepaid, to J. Franklin Edenfield, Esq., Spivey, Carlton & Edenfield, P. O. Box 309, Swainsboro, Georgia, 30401, and G. Conley Ingram, Esq., Alston & Bird, 1200 C & S National Bank Building, 35 Broad Street, Atlanta, Georgia, 30335, the attorneys for Appellee, Cotton States Mutual Insurance Company.

This _____day of April, 1984.

_____

Cousel of Record for Ben McFather, et. al., Appellants

Respectfully submitted,

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PROOF OF MAILING -- AFFIDAVIT

I, Albert W. Stubbs, one of the attorneys for Ben McFather, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 30 day of April, 1984, I deposited in a United States post office located at Columbus, Georgia, with first-class postage prepaid, and properly addressed to the Clerk of Supreme Court of the United States, within the time allowed for filing, the foregoing Response of Appellants to Appellee's Motion to Dismiss.

_____

Albert W. Stubbs

Subscribed and sworn to before me,

at Columbus, Georgia, this 30th

day of April, 1984:

_____

END OF DOCKET